Even assuming that the form was proper the learned magistrate before entering judgment should have enquired whether the person who appeared on behalf of the plaintiff had the right to appear. By Order XIX rule 2 of the Subordinate Courts Rules, so far as it is relevant to this case, the plaintiff could only appear in person or by a solicitor; or if she was not in the Federation or in Singapore by her duly authorised attorney. There is nothing in these rules which allows an agent to appear on behalf of the principal. The magistrate's notes do not even show the name of the person who actually appeared in court when judgment was entered. The fact that appearance on behalf of the plaintiff was by "agent" is only shown in the judgment order that has been extracted.

I come now to execution. Judgment in this case was obtained by default of appearance. Order XXI rule 2 says:

"Every person directed by any judgment to do any act shall comply therewith without demand, and it shall not be necessary to serve him therewith or with any notice thereof save as provided in Order XX rule 6 sub-rule (2)."

The first sentence of Order XX rule 6(2) reads:

"If the person required to do such act was personally present or represented by a solicitor when the judgment or order was given or made, it shall not be necessary to serve him with a copy thereof or any notice of the consequences of default."

Since in this case the defendants were absent and were not represented by a solicitor when judgment was obtained the necessity arose under Order XX rule 6(2) that they should have been served with a copy of the judgment before any step could be taken to enforce the judgment. The court issued the judgment order on 20th August, 1969. Nowhere in the court's record it is shown that the order had been served when the application was made for the issue of execution. Order XXI rule 4 in effect requires the registrar to sign the order "if there appears no reason why execution should not issue." Having regard to Order XX rule 6(2), the implication of this rule should be clear. It is that an order of execution is not issued as a matter of course after judgment has been obtained. Where it has been obtained by default of appearance, as in this case, the registrar should not issue execution unless the judgment creditor has shown to him, in such form as the registrar considers necessary, that copy of the judgment has been served on the judgment debtor.

Order accordingly

DAVID LAU TAI BEK v. LAU EK CHING SDN. BHD.

[O.C.J. (Sharma J.) March 1, 1972]

[Ipoh — Originating Summons No. 631 of 1971]

Companies — General meeting — Convening of annual general meeting — Failure to give notice of postponement — Irregularity — Waiver — Rights of members — Powers of court — Companies Act, 1965, ss. 143(4)(b), 145(2).

The plaintiff is a shareholder in the defendant company. On October 28, 1970, a notice calling the annual general meeting of the company was issued, stating that this meeting was to be held on November 14, 1970 at the company's registered office. No meeting took place on this date. Instead, it was held on November 17, 1970. The plaintiff was not notified of the change of date either orally or in writing. The managing director of the company had communicated the information to the members orally.

Article 73 of the company's articles of association provides that if there was no quorum present at the meeting it "shall stand adjourned to the same day in the next week, at the same time and place, or to such other day, time and place as the directors may by notice to the shareholders appoint".

The plaintiff sought a declaration that the meeting held on November 17, 1970, was null and void, and that the court should act under section 143(4)(b) of the Companies Act and order the annual general meeting to be called.

Held, dismissing the application: (1) once a meeting has been called, the directors have no power to postpone it, and if it has to be postponed, it can only be in accordance with the provisions of the articles of association of the company;

(2) if *all the members* entitled to attend a meeting do so and vote unanimously in favour of a resolution or assent unanimously to the resolution without a meeting being held at all, they are taken to waive any irregularities attending the passing of the resolution, and it is as effective as if it had been properly passed at a duly convened meeting. A majority, however, large, has no power to waive formalities except when the Companies Act so provides. In the present case, there was no assent by the plaintiff and consequently it was not *all* the members who had waived the irregularity in the holding of the meeting on November 17, 1970;

(3) in the circumstances of this case, no practical good could come out of the court ordering a fresh meeting to be called. All except the plaintiff seemed satisfied with what had been done. Thus it was a matter which a majority of the members could, by an ordinary resolution, set right and adopt.

Cases referred to:-

(1) *Smith* v. *Paringa Mines, Ltd.* [1906] 2 Ch. 193.

(2) *Parker and Cooper Ltd.* v. *Reading* [1926] Ch. 975 at p. 984.

(3) *In re Express Engineering Works* [1920] 1 Ch. 466 at p. 470.

(4) *In re George Newman & Co.* [1895] 1 Ch. 674.

(5) *In re Oxted Motor Co. Ltd.* [1921] 3 K.B. 32.

(6) *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China and Japan* (1868) 6 Eq. Cas. 91.

(7) *Foss* v. *Harbottle* (1843) 2 Hare 461; 67 E.R. 189.

(8) *Burland* v. *Earle* [1902] A.C. 83.

(9) *MacDougall* v. *Gardiner* [1875] 1 Ch. D. 13 at p. 25.

(10) *Pender* v. *Lushington* (1877) 6 Ch. D. 70 at p. 80, 81.

(11) *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064.

(12) *Musselwhite* v. *Musselwhite* [1962] Ch. 964.

(13) *Cotter* v. *National Union of Seamen* [1929] 2 Ch. 58 at p. 70.

ORIGINATING SUMMONS.

Abdul Rahim Noor for the plaintiff.

A. Mariadass for the defendant.

Sharma J. (delivering oral judgment): The plaintiff is a shareholder in the defendant company. A notice calling the annual general meeting of the company was issued on the 28th October, 1970 and this meeting was to be held on the 14th November, 1970 at the company's registered office No. 16 Jalan Tokong, Ipoh. The said meeting was not held at all on the 14th November, 1970. It was instead held on the 17th November, 1970. The plaintiff was not notified of the change of date either in writing or orally. The managing director of the company says that she "found out before the 14th day of November, 1970 that the annual general meeting could not be held on the aforesaid date as none of us would be able to be present" on that date. I do not know what she means by "none of us" unless it is meant to refer to the shareholders of the company. She says she informed *all* the members of the company that the meeting would be held on the 17th November, 1970 instead. The decision was hers. Apparently on her own admission the plaintiff had not been informed by her of the change of date. She only orally informed the plaintiff's father to tell the plaintiff about it. The fact, however, remains that the plaintiff was not informed about it. The information she communicated to the members was oral. Section 145(2) of the Companies Act, 1965 requires a written notice for the calling of the meeting. Article 73 of the articles of association of the company provides that if there is no quorum present at the meeting it:

"shall stand adjourned to the same day in the next week, at the same time and place, or to such other day, time and place as the directors may by notice to the shareholders appoint."

Under the articles, therefore, the meeting should have been held on the 21st November, 1970. The annual general meeting of the company for the year 1971 was held on the 20th June, 1971. The plaintiff appointed a proxy but the proxy could not attend the said meeting as he was unable to locate the registered office of the company where the meeting was to be held.

The plaintiff now seeks a declaration that the meeting held on the 17th November, 1970 was null and void and that the court act under section 143(4)(b) of the Companies Act and order the annual general meeting to be called.

In *Smith* v. *Paringa Mines, Ltd.*[1] Kekewich J. said:

"I will assume that the notice was duly issued by the authority of the board, and was given at the proper time and to every shareholder. I entirely agree with the opinion given by counsel that it was not competent for the board to postpone the meeting. The articles provide for the adjournment of a general meeting in certain events, but they contain no provision for postponement. It is said that the directors must be able to postpone the meeting because they may fix the time and place at which the meeting is to be held; but in my opinion that is not so. On the other hand, if the directors had power to postpone, and a meeting adverse to the directors was called, they might postpone it for a week or a month, or perhaps *sine die*. I cannot see that there is any doubt upon the point."

Once a meeting has been called, the directors have no power to postpone it and if it has to be postponed it can only be in accordance with the provisions of the articles of association of the company.

Mr. Mariadass, counsel for the defendant put forward the argument that if the holding of the meeting on the 17th November, 1970 was anything it was only an irregularity which had either been waived or ratified by the plaintiff. He referred to the case of *Parker and Cooper, Ltd.* v. *Reading*[2] and a passage attributed to Warrington L.J. in another case where he said:

"It was competent to (the shareholders) to waive all formalities as regards notice of meetings, *etc.*, and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question."

To appreciate the passage just quoted one has to go back to page 983 of the report where the facts of the case in *In re Express Engineering Works*[3] are stated and which passage reads:

"Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting and transacted the same business. In these circumstances the issue of the debentures was not invalid."

The following passage from the judgment of Lindley L.J. in *In re George Newman & Co.*[4] appears at page 982 in the report of the case of *Parker And Cooper Ltd.* v. *Reading.*[2]

"Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator."

In *In re Oxted Motor Company, Ltd.*,[5] Lush J. said:

"There is no doubt that no notice had been given before the shareholders met intimating an intention to propose the resolution to wind up the company as an extraordinary resolution. It is contended that unless the notice contemplated by that section has been given a resolution is invalid as an extraordinary resolution; and it is said that notwithstanding that all the shareholders in the company were present and were dealing with a matter which was *intra vires*, and notwithstanding that there was no fraud, still the resolution was invalid on that account. In my opinion that contention is not well founded. It would be an extraordinary result if after all the shareholders of a company have been present at a meeting and passed a resolution to wind up the company, afterwards any one else could impeach that resolution on the ground that the shareholders had not had notice of intention to propose the resolution as an extraordinary resolution and that therefore the requirements of section 69 had not been complied with. In my opinion the shareholders are entitled to waive the formality of notice."

In *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan,*[9] Giffard V.C. said:

"It is excessively difficult to make out acquiescence on the part of a body such as a company is. I can understand acquiescence in a case where it is in the power of the persons said to have acquiesced to confirm, but when it is not in the power of the persons said to have acquiesced to confirm, it requires, in order to establish acquiescence, a case from which it must necessarily be inferred that every member of the company has assented."

If *all the members* entitled to attend a meeting do so and vote unanimously in favour of a resolution or assent unanimously to the resolution without a meeting being held at all, they are taken to waive any irregularities attending the passing of the resolution, and it is as effective as if it had been properly passed at a duly convened meeting. A majority however large has no power to waive formalities except when the Companies Act so provides. There clearly was no assent by the plaintiff and consequently it was not *all* the members of the company who had waived the irregularity in the holding of the meeting on the 17th November, 1970.

The second string to the argument of counsel for the defendant is based on the rule in *Foss* v. *Harbottle*[7] and it is necessary to examine the same and see whether it has any application to the facts of the present case. The rule was formulated in the early days of the joint stock companies and its basis is that the majority of the members of a company are entitled to exercise its powers and control its operations. In *Burland* v. *Earle*[8] the Privy Council pointed out that it is an underlying principle:

"of law relating to joint stock companies, that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."

The rule precludes the court from enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs because it cannot be the court's function to take management decisions and to substitute its opinions for those of the directors and the majority of the members. The rule has been extended to such an extent that in some cases it prevents the court from remedying a wrong which has been done to the company unless the majority want it to be remedied. It was given its widest expression by Mellish L.J. in *MacDougall* v. *Gardiner*[9] in the following words:

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed?"

The rule, however, applies only when the majority can cure the irregularity or illegality complained of by passing an ordinary resolution. If an irregularity or an illegality cannot be cured by the passing of an ordinary resolution the court will certainly interfere at the instance of the majority. A member can always sue for wrongs done to himself as a member. The individual rights of a member arise in part from the contract between the company and himself and in part from the general law. He is entitled to restrain the company from doing acts which are *ultra vires*. No question of *ultra vires* arises in this case. He is entitled to have a reasonable opportunity to speak at a meeting of the members of the company. He can enforce his individual right to have his vote recorded. In *Pender* v. *Lushington*,[10] Jessel M.R. observed:

"But there is another ground on which the action may be maintained. This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded — an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss* v. *Harbottle* and that line of cases. He has a right to say, 'Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you'. What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it."

In *Edwards* v. *Halliwell*,[11] Jenkins L.J., said:

"The rule in *Foss* v. *Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong had been done to the company or association and there is nothing is respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right."

"There is a further exception which seems to me to touch this case directly. That is the exception noted by Romer, J., in *Cotter* v. *National Union of Seamen*. He pointed out that the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, as, for instance, in the case of a limited company under the Companies Act, a special resolution duly passed as such. As Romer, J., pointed out, the reason for that exception is clear because otherwise, if the rule were applied in its full rigour, a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution."

Mr. Abdul Rahim Noor in his very able and sustained argument maintains that the plaintiff had a right to be present at the meeting and that it was the personal right of the plaintiff (as opposed to the corporate right of the company) which had been infringed. He strongly relied upon the authority of *Musselwhite* v. *Musselwhite*.[12] It has, however, to be borne in mind that no question of the application of the rule in *Foss* v. *Harbottle*[7] could arise in *Musselwhite's* case because A and B with their respective wives were holding equal number of shares. No practical good can come out of the court ordering a fresh meeting to be called. All except the plaintiff seem satisfied with what has been done. It is, I think, a matter which a majority of the members could by an ordinary resolution set

right and adopt. A member is not invested with a personal right to have all the provisions of the memorandum and articles duly observed. *Cotter* v. *National Union of Seamen*[13] is a case in point. It is no doubt a trade union case but the same principles apply. The dividing line between personal rights and corporate rights is at times very difficult to draw.

The application is dismissed. The costs of both parties, to be taxed as between solicitor and client, are to be paid out of the assets of the company.

Application dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Soo Wai Sun & Co.*

MUNIANDY v. CHAIRMAN, PETALING JAYA TOWN BOARD & ANOR.

[O.C.J. (Abdul Hamid J.) March 3, 1972]

[Kuala Lumpur — Civil Suit No. 1017 of 1967]

Negligence — Duty of care in reversing lorry — Failure to exercise due care.

Damages — Leg — Compound fracture of left leg — ¼" shortening — Blood supply damaged.

The plaintiff was one of a team of labourers accompanying the first defendant's lorry on rounds collecting refuse. He claimed damages for personal injuries suffered in an accident which occurred when the second defendant, the driver, was reversing the lorry into a major road. The plaintiff sustained a severe compound fracture on his left leg. The evidence disclosed that the second defendant was told to stop but proceeded to reverse the lorry a second time without receiving prior signal.

Held: (1) it was the duty of the second defendant to exercise a proper look out when driving. In particular when reversing a lorry of the kind and size he was driving on the day of the accident, it was his duty to exercise greater care as he was reversing into a major road and was unable to see the rear of the lorry except for a restricted view visible from the rear view of the mirror;

(2) in the circumstances of the case $23,000 would be a fair compensation for pain and suffering and loss of amenities and $7,000 for loss of future earnings.

CIVIL SUIT.

E. V. Devadason for the plaintiff.

Raja Abdul Aziz (*Wan Ariff bin Wan Hamzah* with him) for the defendant.

Abdul Hamid J.: The plaintiff's claim is for personal injury suffered in an accident that occurred while the first defendant's Town Board lorry BP 7260 was being reversed.

On 2nd August 1966 the plaintiff was one of a team of labourers accompanying the first defendant's lorry on rounds collecting refuse in or about Petaling Jaya. The lorry entered Road 5/9D from Jalan Putri. The plaintiff and one Rengasamy (PW2) collected refuse along Road 5/9D. To get out, the lorry had to reverse into Jalan Putri — a major road. After collecting the refuse, the plaintiff got on to the step at the nearside rear of the lorry while PW2 stood on the step at the offside.

It is alleged that at the time the lorry started reversing there was a car parked along Jalan Putri towards the rear nearside of the lorry. The plaintiff said that he shouted to the driver of the lorry to stop. The driver of this car was asking for directions. Before the plaintiff could give the directions, the lorry suddenly reversed. The plaintiff got frightened and shouted. There was a collision and one of the plaintiff's legs was injured. Under cross-examination the plaintiff said that it was PW2 who shouted to the driver to stop whilst he himself did not do so. PW2 testified that it was he who signalled the driver to reverse. He did this while he was standing on the step at the rear offside of the lorry. He did tell the driver to stop the lorry by pressing the bell as there was a car parked along Jalan Putri. While giving directions to the driver of this car, the lorry reversed and collided with the car.

Apart from the testimony of the plaintiff and PW2 there is no other evidence to show that another motor-car was involved in the accident. The absence of such evidence however, does not justify my rejecting the evidence of the plaintiff and PW2 that an unknown motor-car was in fact parked along Jalan Putri. A sketch plan was produced but I am unable to derive any assistance from it. There is however this police report lodged by the second defendant that I think requires careful consideration. The report tends to support the testimony of the plaintiff and PW2. In this report it is stated by the second defendant that while reversing the lorry into Jalan Putri, he heard a voice stopping the lorry saying, "Hop-hop" and he thereupon applied the brake and stopped the lorry. He looked back and from the rear view mirror saw a motor-car pass along Jalan Putri. After that he again reversed the lorry and while reversing he heard noises at the back of the lorry. He applied the brake, stopped the lorry and alighted. He noticed that the plaintiff's leg was injured — "Terkena pada tangga kiri belakang" (hit by left rear step).

After carefully considering the evidence, it would seem to me that when the second defendant reversed the second time, that is, after having been told to stop, he had done so without receiving prior signal. It is needless to say that the duty on the part of the driver is heavy. It is his duty to exercise proper lookout when driving. In particular when reversing a lorry of the kind and size the second defendant was shown to have driven on the day of the accident, it was his duty to exercise greater care as he was reversing into a major road and was unable to see the rear of the lorry except for the restricted view visible from the rear view mirror. Furthermore it was, undeniably, his practice to get the signal from the labourers accompanying the lorry before reversing.

Although DW1 testified that he received signal from the plaintiff, I cannot, in the light of the evidence of the plaintiff and PW2 and the police report, accept his evidence.

For what it is worth, there is also the evidence of Dr. Balasubramaniam (PW3) the surgeon who examined the injury on the left leg of the plaintiff who stated that it was a "crush injury" meaning that